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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GLENN H. WEISSMAN, Plaintiff and Appellant, v. MUTUAL PROTECTION TRUST et al., Defendants and Respondents.	B290812 (Los Angeles County Super. Ct. No. BC675187)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Jeffer Mangels Butler & Mitchell, Mark Adams and Susan Allison, for Plaintiff and Appellant.

Davis Wright Tremaine, Mary H. Haas and Anna R. Buono, for Defendant and Respondent Mutual Protection Trust.

Buchalter, Terese A. Mosher Beluris and Vanessa LeFort, for Defendant and Respondent Cooperative of American Physicians, Inc.

Four doctors filed a prior action for a writ of mandate, injunctive and declaratory relief, instructions pursuant to Probate Code section 17200, and interference with contract arising out of the termination of their positions in a physicians' cooperative and a trust. Among other allegations, they alleged that the reasons for the terminations violated California law, including retaliation for opposition to sexual harassment in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.). The trial court denied their request for a writ of mandate on procedural and substantive grounds, and the remainder of the action was dismissed with prejudice.

One of the doctors, plaintiff and appellant Glenn H. Weissman, filed this second action arising out of the same facts against defendants and respondents Cooperative of American Physicians, Inc. (CAP) and Mutual Protection Trust (Mutual) for wrongful termination in violation of the FEHA in retaliation for his opposition to sexual harassment. The trial court sustained the defendants' demurrers and dismissed the second action on the ground that it was barred by the doctrine of claim preclusion.

On appeal, Weissman contends that his second action is not barred by claim preclusion, because it arises from a different primary right than the primary right at issue in the prior action. We conclude that the primary right is the same in both actions, the legal theories alleged in the second action could have been brought in the first, and as a result, the second action is barred. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Underlying Facts

CAP is a cooperative corporation of licensed physicians managed by a board of directors. The members of CAP formed an interindemnity agreement under Insurance Code section 1280.7. Mutual is the trust agreement entered into by the CAP members to provide a reserve for payment of potential professional negligence liability. Mutual provides interindemnity protection for malpractice liability to more than 12,000 physicians. Mutual is governed by a board of trustees, who manage the funds and operations of the interindemnity agreement. The trust agreement requires that the trustees of Mutual also be members of CAP. Mutual pays CAP to manage Mutual's day-to-day business pursuant to a service agreement.

Weissman had been a member of CAP and Mutual since 1999. He was elected as a trustee of Mutual in 2009. On May 28, 2016, CAP sent a letter to Weissman

terminating his membership effective June 14, 2016, "for good cause based on your behavior, which has been determined by the CAP Board to be inconsistent with the best interests of CAP and its operation, reputation and good will, pursuant to Section 1.7.1(c) of the CAP Bylaws." CAP sent a similar letter to Dr. Juan Carlos Cobo. CAP sent letters to two additional doctors stating that the CAP board had voted "No Confidence" in their abilities to act as trustees of Mutual.

On June 9, 2016, CAP provided a detailed letter describing the evidence underlying the board's reasons for terminating Weissman's and Cobo's CAP memberships. The letter stated that Weissman and Cobo no longer practiced medicine, so their continued participation in CAP served no economic purpose to them. The CAP board found a growing level of animus between Weissman and Cobo, on one hand, and CAP board chair Bela Kenessey. The conflict originated when Kenessey raised conflict of interest issues that forced Weissman to resign his position with the CAP Insurance Agency. Weissman made repeated comments to CAP board members and staff about his dislike of Kenessey and his objective to compel Kenessey to leave the organization. The letter described Weissman's unilateral accusation and investigation of Kenessey's expense reports, which had proven false and led to Weissman being placed on probation from his position on the audit committee, and Weissman's repeated attempts to cause the removal of Kenessey from CAP and Mutual committees.

The letter also described Weissman's effort to accuse and investigate Kenessey of sexual harassment of chief executive officer Sarah Pacini. The CAP board concluded that if Weissman believed Kenessey or Pacini had engaged in conduct proscribed by the employment policies, Weissman should have referred the matter to the joint CAP and Mutual Audit Committee or Human Resources Director, rather than conducting an investigation himself with the cooperation of specific Mutual trustees who usually voted with Weissman.

The letter concluded, "This personal animus, and not any interests of CAP, its operation, reputation, or goodwill, was the sole evidence of Dr. Weissman's and Dr. Cobo's purpose in characterizing the conduct of Dr. Kenessey and Ms. Pacini as wrongful. [¶] Lastly, the CAP Board discussed various anecdotal evidence that Drs. Weissman and Cobo have created a major rift between CAP and [Mutual], and that this rift threatens the foundation of all of CAP's operations, the Administrative Services Agreement between CAP and [Mutual], and CAP operations under that agreement as well as those of the entire enterprise by creating an increased risk that Ms. Pacini and other executive staff may leave or be forced out of CAP due to the resulting 'toxic work environment.'"

Allegations of *Weissman I*

On July 13, 2016, Weissman, Cobo, and two additional Mutual trustees (collectively plaintiffs) filed an action

against CAP and 10 CAP directors (collectively the CAP defendants), and the three remaining Mutual trustees. (*Weissman et al. v. Cooperative of American Physicians, Inc. et al.* (Super. Ct. L.A. County, 2016, No. BC625309) (*Weissman I*).) The plaintiffs sought a writ of mandamus, injunctive and declaratory relief, instructions pursuant to Probate Code section 17200, and damages for interference with contract as follows.

The general allegations stated that CAP's reasons for terminating Weissman's and Cobo's CAP membership constituted: (1) retaliation for Weissman and Cobo's investigation of sexual harassment allegations against CAP director Kenessey by the chief executive officer of CAP and Mutual; (2) retaliation for Weissman's audit of Kenessey's billing and reimbursement records for unauthorized expenses; (3) a perception that Weissman and Cobo had stopped practicing medicine at the age of 65; (4) Cobo's temporary suspension of the practice of medicine due to a disability; and (5) retaliation for opposing CAP directors' attempts to merge the boards of CAP and Mutual. The CAP defendants hoped to gain control of Mutual's funds by changing control of Mutual's board of trustees.

The plaintiffs alleged that the terminations of Weissman's and Cobo's CAP memberships were void because the terminations violated substantive law prohibiting: (1) discharging or discriminating against any person for opposing sexual harassment under Government Code section 12940, subdivisions (h), (j), and (k); (2) retaliating against an

employee for reporting a violation of a state statute to another employee who has authority to investigate, discover or correct the violation under Labor Code section 1102.5, subdivisions (a) and (d); (3) termination procedures that are not substantively rational and procedurally fair; (4) aiding and abetting an employer's termination of an employee based on age; and (5) aiding and abetting an employer's failure to make reasonable accommodations for disability.

Weissman and Cobo noted that they intended to file complaints with the California Department of Fair Employment and Housing (DFEH) against the CAP defendants for the FEHA violations. When they received right to sue letters, they intended to amend the complaint in *Weissman I* to allege those counts against the CAP defendants.

The complaint contained detailed allegations of Weissman's actions in connection with his audit duties and his investigation of sexual harassment, which his fiduciary duties required him to perform. The June 9, 2016 letter contained false and pretextual reasons for terminating Weissman's and Cobo's memberships.

The declaratory relief count alleged that the termination of Weissman's and Cobo's CAP memberships was illegal and void, based on the CAP defendants' violations of procedural requirements and substantive law. The CAP defendants failed to follow required procedures to terminate CAP or Mutual membership. The substantive law that was violated included the right under Government Code section

12940, subdivision (h), not to be discharged, expelled, or otherwise discriminated against for opposing sexual harassment, and the prohibition under Government Code section 12940, subdivision (i), against compelling or coercing the termination of employment based on age or physical disability. The reasons for terminating Weissman's and Cobo's CAP memberships violated public policy, because they were protected under the FEHA as employees of Mutual. The plaintiffs sought a judicial determination that the purported terminations of Weissman and Cobo's CAP memberships, Mutual memberships and status as Mutual trustees were invalid and void, having no effect, and confirming their current status as members and trustees of Mutual, with all the associated powers and responsibilities.

They sought a writ of mandate ordering injunctive relief compelling the defendants to restore the plaintiffs to their status prior to the dispute and enjoining the defendants from refusing to recognize Weissman's and Cobo's status as members of CAP and Mutual, and as trustees of Mutual. They sought instructions to the trustees of Mutual that Weissman and Cobo were members and trustees of Mutual. Lastly, Weissman and Cobo sought damages from all of the defendants for interference with contract.

Proceedings in *Weissman I*

The trial court heard the petition for a writ of mandate on February 24, 2017, prior to the other causes of action alleged in the complaint. The plaintiffs argued in their opening brief that they had exhausted the administrative remedies available to them. The CAP board's termination of Weissman's and Cobo's CAP memberships was procedurally defective, because they failed to comply with the Corporations Code and CAP's bylaws. The terminations were substantively defective, because the reasons given for the terminations constituted illegal retaliation under the FEHA, the terminations were not conducted in good faith as required by the Corporations Code, the decisions relied on hearsay, the terminations prevented Weissman and Cobo from performing their fiduciary duties as Mutual trustees, and the procedures violated their common law right to fair procedure.

The plaintiffs argued that the reasons for the terminations set forth in the CAP board's June 9, 2016 letter constituted violations of substantive law and public policy. In particular, CAP's reasons violated substantive law under the FEHA that prohibits discharging or discriminating against any person for opposing sexual harassment or retaliating against an employee for reporting a violation of the prohibition against sexual harassment to another employee who has authority to investigate or correct the violation. It was a violation of California and federal law to

discharge, expel, or take retaliatory action against any person who had opposed any practices that the person reasonably believed constituted sexual harassment. The CAP board explicitly stated that Weissman and Cobo were terminated for investigating allegations that Kenessey sexually harassed a CAP employee. In addition, terminating a membership in a cooperative corporation for engaging in legally protected activity could not be found to have been taken in good faith, as required under Corporations Code section 12431, subdivision (b).

The trial court found CAP's termination procedures were fair and reasonable, and the terminations were not made in bad faith. In addition, the court found Weissman and Cobo failed to exhaust their administrative remedies to object to the terminations. Weissman's and Cobo's memberships in Mutual had not been terminated, but rather, they became ineligible to participate in Mutual based on the termination of their CAP memberships. The plaintiffs failed to show that the termination of the CAP memberships was procedurally or substantively defective, so the petition for a writ of mandamus was denied. The plaintiffs filed a petition for writ of mandate with this appellate court on March 21, 2017, which was denied on March 30, 2017, for failure to exhaust administrative remedies.

At a case management conference on April 21, 2017, Weissman informed the trial court that he would file an amended complaint. The trial court continued the case

management conference to July 10, 2017. Weissman filed a complaint with the DFEH on June 14, 2017, and requested an immediate right to sue notice. DFEH issued a right to sue letter to Weissman that day.

On June 15, 2017, the CAP defendants filed a demurrer to the remaining causes of action on the grounds that declaratory relief was not available, instructions under Probate Code section 17200 were not applicable, and the cause of action for interference with contract could not be sustained, because the terminations had been upheld in the mandamus proceeding. That same day, the Mutual trustees filed a demurrer to the remaining claims on the grounds that the causes of action for declaratory relief and instructions were moot, and they could not be held liable for interference with contract because they could not interfere with their own contracts.[1]

On June 26, 2017, Weissman filed a notice of non-opposition to the demurrer of the CAP defendants, as well as a notice of non-opposition to the demurrer of the Mutual trustees. On July 10, 2017, the trial court sustained the defendants' demurrers as to the remaining causes of action without leave to amend. The trial court entered judgment in favor of the defendants on August 9, 2017.

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[1] On December 21, 2018, Mutual filed a request for judicial notice of the demurrer filed by the trustee defendants in the first action, the notice of non-opposition filed by Weissman, and a notice of dismissal in another case. The request for judicial notice is granted.

Weissman II

On September 11, 2017, Weissman filed the complaint in the instant action (*Weissman II*) against Mutual and CAP alleging retaliation in violation of public policy and the FEHA for his opposition to sexual harassment and the failure to prevent sexual harassment. The trial court sustained demurrers filed by CAP and Mutual with leave to amend. Weissman filed an amended complaint on March 15, 2018, which also alleged retaliation in violation of the FEHA and public policy for his opposition to sexual harassment and the failure to prevent sexual harassment.

CAP and Mutual each filed a demurrer to the amended complaint on the grounds that it was barred by claim and issue preclusion. On April 30, 2018, Weissman filed oppositions to CAP's demurrer and Mutual's demurrer. In both oppositions, Weissman argued that the standard of proof for the FEHA count was lower than for the writ of mandate. The complaints did not allege the same causes of action and were based on different primary rights. Even if he could have obtained a right to sue letter earlier, the FEHA claim would not have been heard at the same time, because the petition for a writ of mandamus was an expedited procedure. CAP and Mutual each filed a reply.

A hearing was held on the demurrers on May 11, 2018. The court took the case under submission. On May 14, 2018, the trial court issued a ruling sustaining the demurrers without leave to amend. The court found both actions,

Weissman I and *Weissman II*, sought to vindicate the same primary right, "the right to be free from wrongful termination." The court also found that Weissman could have brought his counts under the FEHA in the prior action. Final judgment had been rendered against Weissman in *Weissman I* as to all of his claims, not simply the petition for mandamus. The trial court entered judgment against Weissman in the instant action on June 7, 2018. Weissman filed a timely notice of appeal.

DISCUSSION

Standard of Review

On appeal from a judgment of dismissal following an order sustaining a demurrer, we review the complaint de novo to determine whether the allegations state a cause of action under any legal theory. (*Boyd v. Freeman* (2017) 18 Cal.App.5th 847, 853 (*Boyd*).) "'We treat the demurrer as admitting all material facts which were properly pleaded. [Citation.] However, we will not assume the truth of contentions, deductions, or conclusions of fact or law [citation], and we may disregard any allegations that are contrary to the law or to a fact of which judicial notice may be taken. [Citation.]' [Citation.]" (*Ibid.)* "'Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend

the complaint to state a cause of action. [Citation.]' [Citation.]" (*Ibid.*)

General Principles of Preclusion

"The law of preclusion helps to ensure that a dispute resolved in one case is not relitigated in a later case." (*Samara v. Matar* (2018) 5 Cal.5th 322, 326 (*Samara*).) Under modern preclusion law, we use the term "claim preclusion" in place of "res judicata." (*Ibid.*) "Claim preclusion prevents relitigation of entire causes of action." (*Ibid.*) "Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties [or those in privity with them] (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 (*DKN Holdings*); see also *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 (*Mycogen*).)

We use the term "issue preclusion" instead of "direct or collateral estoppel." (*Samara*, *supra*, at p. 326.) "Issue preclusion, by contrast, prevents 'relitigation of previously decided issues,' rather than causes of action as a whole. [Citation.]" (*Id.* at p. 327.) Issue preclusion applies "(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one

in privity with that party." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 825.)

Historical Development of the Primary Rights Doctrine

In California, two proceedings involve the same cause of action if they are based on the same "primary right." (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797–798 (*Boeken*).) Under the primary rights theory developed by Hastings College of Law Professor John Norton Pomeroy in the nineteenth century, a cause of action is comprised of a plaintiff's primary right, a defendant's corresponding duty, and the defendant's wrongful act breaching that duty. (Heiser, *California's Unpredictable Res Judicata (Claim Preclusion) Doctrine* (1998) 35 San Diego L.Rev. 559, 571 (hereafter Heiser).)

When codified in 1872, California's joinder statute Code of Civil Procedure section 427, divided legal claims into seven categories, and a plaintiff could not join claims from different categories in the same complaint. (Former Code of Civ. Proc., § 427, repealed by Stats. 1971, ch. 244, § 22, p. 378; Heiser, *supra*, at p. 572.) A plaintiff could join causes of action in a complaint as long as they belonged to one category: (1) contracts; (2) claims to recover real property, including claims for waste, rents and profits; (3) claims to recover specific personal property; (4) claims against a

trustee; (5) injuries to character; (6) injuries to person; or (7) injuries to property. (Former Code of Civ. Proc., § 427.)

Pomeroy's primary rights theory made sense in this historical context. (Heiser, *supra*, at p. 573.) "If, for example, the joinder rules prohibited a plaintiff from pleading claims for tortious injury to person and to property against a defendant in one lawsuit, a personal injury judgment in the first lawsuit should not extinguish plaintiff's claims for property damages in a second action." (*Ibid.*, fn. omitted.) "Over time, the California courts viewed the categories of permissibly joinable claims designated in the original version of former Section 427 as synonymous with Pomeroy's classifications of primary rights." (*Id.* at p. 574, fn. omitted.)

After various revisions, California repealed Code of Civil Procedure section 427 in 1971 and replaced it with the broad joinder provisions of Code of Civil Procedure section 427.10, which allowed plaintiffs to plead all of their causes of action against a defendant in one lawsuit. (LaBerge, *Delusive Exactness in California: Redefining the Claim* (2017) 50 Loyola L.A. L.Rev. 365, 371 & fn. 31 (hereafter LaBerge).) Unlike federal courts and other state courts that moved to a transactional approach to claim preclusion, however, California continued to apply the primary rights approach. (*Id.* at p. 368.)[2]

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[2] The Federal Rules of Civil Procedure, adopted in 1938, allowed for liberal joinder of claims. (LaBerge, *supra*, at p. 371.) In 1982, in response to liberalized modern joinder

The term "cause of action" is often used loosely in California to refer to a count that states a cause of action under a particular legal theory, but the term "cause of action" has a precise definition in the context of primary rights: a primary right, a corresponding duty, and a breach of that duty. (*Boeken*, *supra*, 48 Cal.4th at p. 798.) "'As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered. [Citation.] It must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief." [Citation.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one

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rules, the Restatement Second of Judgments recommended defining a "claim" for the purpose of preclusion law by "the transaction, or series of connected transactions, out of which the action arose." (Rest.2d Judgments, § 24, subd. (1).) Federal courts rely on a transactional analysis to determine whether two lawsuits constitute a single cause of action because "'they both arise from the same "transactional nucleus of facts" [citation] or a single "core of operative facts." [Citation.]' . . . [Citation.]" (*Guerrero v. Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, 1099, fn. 3 (*Guerrero*).) California is the only state that continues to apply the primary rights approach to claim preclusion. (LaBerge, *supra*, at p. 368.)

not being determinative of the other." [Citation.]'" (*Mycogen, supra,* 28 Cal.4th at p. 904, quoting *Crowley v. Katleman* (1994) 8 Cal.4th 666, 681–682.) "Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken*, *supra*, 48 Cal.4th at p. 798.)

"Under this doctrine, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date. '"Res judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause of action on a different legal theory or for different relief."' [Citation.]" (*Mycogen*, *supra*, 28 Cal.4th at p. 897.) California's rule against splitting a cause of action into multiple lawsuits incorporates the requirements of claim preclusion. (*Boyd*, *supra*, 18 Cal.App.5th at p. 858.) '"'[W]hen a plaintiff attempts to divide a primary right and enforce it in two suits,"' the primary right theory prevents this result in two ways: '"(1) if the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement [citation]; [and] (2) if the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata [citation]."' [Citation.]" (*Ibid.*, fn. omitted.)[3]

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[3] "As Witkin explains, when a plea of abatement based on a pending prior action is established in a second action,

"Res judicata bars not only issues that were raised in the prior suit but related issues that could have been raised." (*Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 569 (*Villacres*).) "'"The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent. Public policy and the interest of litigants alike require that there be an end to litigation."' [Citation.] '[R]es judicata benefits both the parties and the courts because it "seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration*."' (*Mycogen*[, *supra*,] 28 Cal.4th [at p.] 897.)" (*Id.* at p. 575.)

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the appropriate remedy is the entry of an interlocutory judgment postponing trial, rather than dismissal of the action. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 971, pp. 383–385.)" (*Boyd*, *supra*, 18 Cal.App.5th at p. 858, fn. 6.) In contrast, the federal courts have developed an independent claim-splitting doctrine, which arises from the power of the federal district court to manage their dockets and does not require a prior judgment on the merits. (*Id.* at p. 861, fn. 8.) A federal district court may dismiss a second action alleging claims that could have been raised in an earlier filed action, even if the first action does not result in a judgment on the merits. (*Ibid.*)

"""If the matter was within the scope of the action, related to the subject matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it . . . . The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. . . .""" [Citation.] [¶] 'The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, "litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background." . . . ". . . [U]nder what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. . . . '. . . [A]n issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . .""" [Citation.]" (*Villacres*, *supra*, 189 Cal.App.4th at p. 576.)

Claim Preclusion Resulting from *Weissman I*

Weissman contends the claims in *Weissman II* for violations of the FEHA and public policy are not precluded by the judgment in *Weissman I*, because the two actions are based on different primary rights. Specifically, he contends *Weissman II* arises from his right to be free of retaliation for opposing sexual harassment and *Weissman I* arose from his right to require CAP to comply with the procedures in its by-laws and governing statutes relating to member terminations and trustee removals. Weissman's contention mischaracterizes what was at issue in *Weissman I*: we conclude that Weissman's primary right to be free of retaliation for opposing sexual harassment was raised and decided on the merits in *Weissman I*.

Under the primary rights doctrine, Weissman had a single cause of action based on his right to be free of retaliation for opposing sexual harassment. CAP and Mutual had a corresponding duty not to retaliate against Weissman for opposing sexual harassment. CAP and Mutual breached this duty, according to Weissman, by terminating his membership and position in the organizations because he opposed sexual harassment.

Weissman invoked this primary right to be free from retaliation in *Weissman I* in connection with his request for declaratory and injunctive relief. Weissman requested a declaration that the termination of his CAP membership, his Mutual membership, and his status as a Mutual trustee,

was illegal and void, because the termination violated substantive law prohibiting discharging or discriminating against any person for opposing sexual harassment under the FEHA. The reasons for the termination violated public policy, he alleged, because he was protected by the FEHA as an employee of Mutual. He further sought to enjoin the organizations from denying his status as a member of CAP and as a member and trustee of Mutual, with the associated powers and responsibilities.

An action solely for declaratory relief, which simply declares the legal relationship between the parties, does not bar a later action under the claim preclusion doctrine. (*Mycogen*, *supra*, 28 Cal.4th at pp. 898–900.) If the action seeks coercive relief in addition to declaratory relief, however, such as an injunction ordering a party to do or refrain from doing something, the exception does not apply and the general rules of claim preclusion govern. (*Id.* at pp. 899–901.) When an action seeks coercive relief in addition to declaratory relief, "any subsequent suit based on the same cause of action is barred." (*Id.* at p. 904.)

Weissman did not seek purely declaratory relief in *Weissman I*, but also sought injunctive relief to compel CAP and the Mutual trustees to act in accordance with the court's declaration. The trial court dismissed the declaratory relief count with prejudice, and Weissman took no appeal from that dismissal. For the purposes of claim preclusion, "a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action."

(*Boeken*, *supra*, 48 Cal.4th at p. 793.) As a result, Weissman's subsequent lawsuit based on the same cause of action is barred.

Another remedy that Weissman pursued in *Weissman I* was a writ of mandate to compel the defendants to restore his status and enjoin them from refusing to recognize his status as a member of CAP and Mutual, and as a trustee of Mutual. In connection with this remedy, Weissman again alleged and argued that his termination was in violation of his primary right to be free from retaliation. Specifically, CAP's reasons violated public policy and substantive law under the FEHA that prohibits discharging or discriminating against any person for opposing sexual harassment or retaliating against an employee for reporting a violation of the prohibition against sexual harassment to another employee who has authority to investigate or correct the violation. In addition, the termination of his membership for engaging in legally protected activity could not be found to have been taken in good faith, as required by the Corporations Code. The trial court ruled that the terminations did not violate procedural or substantive law, and Weissman failed to exhaust administrative remedies.

Weissman cannot avoid the preclusive effect of having raised and lost his substantive claims in *Weissman I* by arguing that this appellate court denied his petition for a writ of mandate solely on the ground that he failed to exhaust his administrative remedies. Weissman did not challenge the trial court's decision by way of appeal, so the

judgment in *Weissman I* was determinative of the issue on the merits. Weissman filed a petition for a writ of mandate during the proceedings, but an appellate court's denial of a writ petition is not law of the case unless the court issues an alternative writ accompanied by a written opinion. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 891.) "A short statement or citation explaining the basis for the summary denial does not transform the denial into a decision of a cause entitled to law of the case effect." (*Id.* at p. 895.) Weissman did not challenge the judgment by filing an appeal from the final judgment. As a result of the final judgment on the merits in *Weissman I* denying a writ of mandate and dismissing the request for injunctive and declaratory relief with prejudice, the claims in *Weissman II* based on the same primary right are precluded.[4]

At least two of the counts in *Weissman I* (i.e., declaratory and injunctive relief, and writ of mandate),

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[4] When alternate grounds for a judgment are challenged on appeal, but judgment is affirmed solely on a ground that does not bar a subsequent action, the preclusive effect of the judgment is as if the trial court did not rely on the unreviewed ground. (*Samara*, *supra*, 5 Cal.5th at pp. 325–326.) The *Samara* court took no position, however, "on the significance of an independently sufficient alternative ground reached by the trial court and *not* challenged on appeal." (*Id.* at p. 337.) In this case, the trial court's alternate grounds for denying the writ of mandate included a determination on the merits that CAP's termination did not violate substantive law.

therefore, sought remedies for the defendants' breach of Weissman's primary right to be free of retaliation for opposing sexual harassment. Weissman could have brought his additional counts based on that same primary right, including statutory violations of the FEHA, in *Weissman I*. As a result, the trial court properly determined that Weissman's second action was barred.

The cases that Weissman relies upon are distinguishable. In *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475 (*George*), an employee challenged disciplinary action imposed against her with the State Personnel Board on the ground that the discipline was unwarranted, because the alleged misconduct did not occur or did not warrant discipline, but not because the discipline was retaliatory. The Board agreed with her in part. She filed a petition for a writ of mandate as to the remaining discipline, which the trial court denied. The employee subsequently filed an action alleging that the discipline was retaliation for charges that she filed with the Department of Fair Employment and Housing (DFEH). The *George* court found, "The primary right protected by the state civil service system is the right to continued employment, while the primary right protected by FEHA is the right to be free from invidious discrimination and from retaliation for opposing discrimination. We have held that 'state employees may pursue their claims of employment discrimination with either the Board or the DFEH or both.' [Citation.]" (*George*, *supra*, at p. 1483.) "For this reason,

there is no requirement that a state employee raise the FEHA issue during the administrative review process, and the doctrine of res judicata does not act as a complete bar to a FEHA action when an employee seeks review through an alternative administrative remedy available as a consequence of the employee's civil servant status." (*Id.* at p. 1484.) In this case, unlike the plaintiff in *George*, Weissman actually raised his right to be free from retaliation in *Weissman I* and judgment was entered against him on the merits.

Similarly, in *Henderson v. Newport-Mesa Unified School Dist.* (2013) 214 Cal.App.4th 478 (*Henderson*), plaintiff Henderson participated in an administrative hearing, arguing that she had been improperly classified as a temporary employee. The Administrative Law Judge (ALJ) concluded that the District had good cause for its termination decisions. Henderson filed a petition for writ of mandate challenging the ALJ's decision, but dismissed the petition with prejudice. Henderson subsequently filed an action against the District for violation of the Education Code's priority rules and wrongful discrimination on the basis of race in violation of the FEHA. The *Henderson* court concluded that the primary right in the administrative proceeding was Henderson's right to proper classification, while the primary rights asserted in the second action were her rights to priority in rehiring and to be free from discrimination, which was not adjudicated in the earlier administrative proceeding. (*Id.* at pp. 500–502.) In this

case, unlike the plaintiff in *Henderson*, Weissman raised his right to be free from retaliation in *Weissman I* and litigated his legal theories on the merits. The trial court properly found *Weissman II* was barred under the claim preclusion doctrine.[5]

[5] It is undisputed on appeal that Mutual is the same party or in privity with the defendants named in *Weissman I*.

DISPOSITION

The judgment is affirmed. Respondents Mutual Protection Trust and Cooperative of American Physicians, Inc., are awarded their costs on appeal.

MOOR, J.

We concur:

RUBIN, P. J.

KIM, J.